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In the Supreme Court of the United States

OCTOBER TERM 1972

No. 72-262

THOMAS J. O'BRIEN,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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OCTOBER TERM 1972

No.

THOMAS J. O'BRIEN,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner THOMAS J. O'BRIEN respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on July 18, 1972.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the District of Massachusetts.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was entered on July 18, 1972 This petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

Questions Presented

1. Whether a dismissal of an indictment in a prior action gives use to a defense of res judicata or collateral estoppel in a subsequent criminal action involving a similar offense.
2. Whether the second prosecution of the defendant was barred by reason of judicial estoppel.

Statutory Provisions Involved

United States Code, Title 26:

Sec. 7201. Attempt to Evade or Defeat Tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Sec. 7206. Fraud and False Statements.

Any person who —

(1) Declaration Under Penalties of Perjury.— Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

United States Code, Title 18:

Federal Rules of Criminal Procedure.
Rule 48. Dismissal.
(a) By Attorney for Government. The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

Statement of the Case

First Case

On June 10, 1970, Thomas J. O'Brien, the petitioner herein, was indicted by a federal grand jury in the District of Massachusetts, on a four-count indictment charging him with tax evasion by filing false and fraudulent income tax returns understating his taxable income for each of the calendar years 1964, 1965, 1966, and 1967, in violation of 26 U.S.C. 7201.

The case was assigned to Judge Wyzanski and identified as Criminal No. 70-182-W.

O'Brien, the defendant in the District Court, pleaded not guilty, and filed a motion to suppress certain evidence. The government and the defendant stipulated that for purposes of the motion to suppress, the facts were indistinguishable from those of *United States* v. *Leahey,* 434 F.2d 7 (1st Cir. 1970), and the motion to suppress evidence was granted on January 4, 1971.

On January 26, 1971, the United States Attorney requested leave of the Court to file a Dismissal of Indictment, pursuant to Rule 48 of the Federal Rules of Criminal Procedure,

> ". . . for the reason that upon Motion to Suppress, the bulk of the Government's evidence was suppressed; there is no reasonable likelihood that the case may be brought to conviction, and the United States Attorney believes that further prosecution would not be in the interests of justice."

Leave to file the dismissal was granted by Judge Wyzanski, and the prosecution terminated. The government gave no indication that any further prosecution was contemplated (and, indeed, had represented to the Court and the defendant in requesting leave to dismiss that "further prosecution would not be in the interests of justice").

Second Case

On April 15, 1971, more than three months after the dismissal of the indictment in the first case, O'Brien again was indicted, on another four-count indictment, this one charging him with willfully making false statements under oath, by understating his gross income from his business or profession in income tax returns filed for each of the calendar years 1964, 1965, 1966, and 1967, in violation of 26 U.S.C. 7206(1).

This case was assigned to Judge Garrity and identified as Criminal No. 71-206-G.

O'Brien pleaded not guilty and filed a motion to dismiss on the ground that the first case in Criminal No. 70-182-W barred further prosecution by reason of collateral estoppel.

Judge Garrity denied the motion to dismiss on August 12, 1971.

O'Brien then agreed with the government and the Court to waive a trial by jury and assent to a finding of guilty on all counts of the indictment, subject only to his right

to appeal to the Court of Appeals for the First Circuit on the theory that the proceedings in the first case constituted a bar to his conviction in the second case as a matter of law. (This was essentially the same procedure as that followed in *United States* v. *Sabella*, 272 F.2d 206, 208 (2d Cir. 1959), where the defendant relied solely upon proceedings in a prior case as a bar.)

On March 13, 1972, a judgment of conviction was entered by the Court, and O'Brien was sentenced to concurrent terms of imprisonment on each count and to pay a fine of $2,000 on each count, with sentence to be stayed pending the appeal to Court of Appeals.

A timely notice of appeal to the Court of Appeals was filed by O'Brien on March 21, 1972.

On July 18, 1972, the judgment of the District Court was affirmed by the Court of Appeals for the First Circuit. The Court of Appeals held, in short, that the dismissal of the indictment in the first case did not bar prosecution in the second case on grounds of due process, estoppel or double jeopardy. The Court of Appeals held that it would not abandon the usual rule that the dismissal of an indictment under Rule 48 (a) is without prejudice unless the court explicitly indicates otherwise or unless jeopardy has attached. The Court of Appeals determined that the Court in the first case did not dismiss the indictment with prejudice, and that jeopardy had not attached since the order of dismissal was entered prior to impaneling of a jury.

The Court of Appeals also held that O'Brien's ability to defend himself in the second case was not prejudiced by the delay in prosecution.

The Court of Appeals concluded that the District Court in the second case ". . . was justified in believing that a change in circumstances or available evidence made a prosecution for violation of the internal revenue laws, once thought futile for lack of evidence and therefore not in the

interests of justice, suddenly feasible and therefore proper." See p. 26 of Appendix hereto.

Reasons for Granting the Writ

I. The Decision Below Conflicts with the Decisions of this Court and with the Decisions of other Courts of Appeals as to the Proper Construction of the Fifth Amendment as Applied to the Type of Problem in this Case and Related Cases.

The Court of Appeals in its opinion ignored the recent decisions of this Court, and other Courts of Appeals as to the proper construction and interpretation of the words "same offense" and the concept of "jeopardy" of the Fifth Amendment to the Constitution as applied to the type of problem involved in this case and related cases.

The Fifth Amendment to the Constitution of the United States provided in relevant part: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

Until recent years this constitutional provision tended to be narrowly construed and applied by the courts. Although recognizing that the words "life and limb" could not be given a literal construction in an era in which loss of life or limb infrequently is a punishment for criminal offenses, the courts tended to give a narrow and restricted construction to the words "same offense" and to the concept of "jeopardy", and it further was held that the Double Jeopardy Clause had no application to the state courts. *Palko* v. *Connecticut*, 302 U.S. 319 (1937). Generally it was said that "jeopardy" attached only when a defendant was put to trial before a court or jury, and that the constitutional provision precluded only a second trial by the same judicial system after a prior conviction or acquittal for the identical offense.

Green v. *United States*, 355 U.S. 184 (1957) marked the beginning of an era of more liberal and more reasonable application of the Double Jeopardy Clause. In that case the defendant had been indicted for first-degree murder and at trial had been found guilty of only the lesser offense of second-degree murder. After a successful appeal of that conviction, he was retried on the original indictment and found guilty of first-degree murder, despite his contention that the prior conviction amounted to an acquittal of the more serious offense. The Supreme Court rejected the idea that Green had "waived" his rights by appealing from the original invalid conviction and held that a second trial for first-degree murder was contrary to the letter and spirit of the Fifth Amendment, indicating that the Double Jeopardy Clause no longer should be given a "narrow, grudging application":

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may well be found guilty." 355 U.S. at 187-188.
>
> "The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued. If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance." 355 U.S. at 198.

Six years later, in *Downum* v. *United States,* 372 U.S. 734 (1963), this Court again indicated that in application of the Double Jeopardy Clause any doubts be resolved in favor of the individual citizen, 372 U.S. at 738, and held that a defendant could not be retried after a trial at which a jury was empanelled and then discharged on motion of the prosecutor because a key witness was missing.

In two 1969 decisions the Double Jeopardy Clause again was given an expanded interpretation by this Court. In *Benton* v. *Maryland,* 395 U.S. 784 (1969) this Court reversed *Palko* v. *Connecticut,* 302 U.S. 319 (1937) and held that the Double Jeopardy concept is applicable to the states as a matter of Due Process under the Fourteenth Amendment:

> "The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this Nation's independence." 395 U.S. at 795.

This Court held in *North Carolina* v. *Pearce,* 395 U.S. 711, 726 (1969) that the Double Jeopardy Clause precludes imposition of a more severe sentence upon a defendant after a successful appeal from a conviction, in the absence of significant reasons appearing of record; a defendant cannot be penalized for having obtained a reversal of his original conviction.

The decisions in *Green, Downum, Benton,* and *Pearce* during the years 1957-1969 provide a setting for the decision in *Ashe* v. *Swenson,* 397 U.S. 436 (1970), in which this Court held that the concept of "collateral estoppel" is embodied in the Double Jeopardy Clause of the Fifth Amendment, 397 U.S. at 445, and firmly rejected the notion that double jeopardy should apply only where the

offenses charged and the evidence necessary to prove them are identical. The defendant in *Ashe* had been tried and acquitted for the armed robbery of one person at a poker game, and then had been retried and convicted for armed robbery of another participant in the same game.

In *Ashe* this Court again leaned to a broad interpretation and application of the Double Jeopardy Clause:

> "The federal decisions have made it clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." 397 U.S. at 444.

Although *Ashe* broke new ground in holding that the concept of collateral estoppel is an integral part of the concept of double jeopardy, it had been aforeshadowed by at least two earlier decisions by this Court.

United States v. *Oppenheimer,* 242 U.S. 85 (1916) arose from an unusual factual situation. The defendant first had been indicted for conspiracy to conceal assets from a trustee in bankruptcy, and the indictment had been quashed as barred by the statute of limitations—A ruling of law which later was held erroneous in an unrelated case. The defendant then was reindicted, this plea in bar of the prior adjudication was rejected, and he was convicted. On appeal, this Court held that the adjudication in the first case was a bar to the second prosecution and conviction on principles of *res judicata,* rejecting the government's contention that *res judicata* could apply to a criminal case only "in the modified form of the Fifth Amendment." 242 U.S. at 85.

> "Of course the quashing of a bad indictment is no bar to a prosecution upon a good one, but a judgment

> for the defendant upon the ground that the prosecution is barred goes to his liability as a matter of substantive law and one judgment that he is free as a matter of substantive law is as good as another." 242 U.S. at 87.

Under notions of double jeopardy prevailing at the time of *Oppenheimer*, the defendant in that case never had been "put in jeopardy", because the first indictment had been quashed before a trial commenced; but the decision in *Oppenheimer* established that a prior adjudication in favor of the defendant (other than on procedural grounds) nevertheless would bar a second prosecution as a matter of *res judicata*.

The same principle was applied in *Sealfon* v. *United States*, 332 U.S. 575 (1948). There the defendant first was indicted for conspiracy to defraud the United States by presenting false invoices to a rationing board, and was acquitted. Thereafter he was indicted for publishing false invoices — the same invoices again — and convicted. "The basic facts in that trial [the first trial] were identical." 332 U.S. 575. The conviction was reversed on the grounds of *res judicata*, although the offenses charged were not identical and the concept of double jeopardy as such therefore was inapplicable according to then prevailing interpretations of the Double Jeopardy Clause.

Thus in the *Ashe* case this Court recognized that it was not creating "new law":

> " 'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future law

> suit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in United States v. Oppenheimer . . . ." 397 U.S. at 443.

Other decisions subsequent to *Ashe* also have recognized that a second trial of a defendant for essentially the same offense is inconsistent with the principles of *res judicata* and collateral estoppel, even if the offenses charged the second time have a different statutory basis. The following cases are illustrative.

United States v. *Fusco*, 427 F.2d 361 (7th Cir. 1970). The defendant first was indicted for theft of goods from an interstate shipment. He was found guilty, but on appeal his conviction was reversed "on the basis of insufficient evidence to sustain the charge of theft." He then was indicted a second time, for possession of goods stolen from an interstate shipment — the same goods. His motion to dismiss the new indictment was denied, and he was found guilty. On appeal, the conviction was reversed. The Court of Appeals noted that the old "same evidence" test of double jeopardy had been rejected by the Supreme Court, 427 F.2d at 362, and said:

> "Considering the latest decisions of the Supreme Court on the subject, we hold that the second prosecution and conviction of Fusco were in violation of his constitutional rights against double jeopardy." 427 F.2d at 363.

For application of the same principle in the reverse situation, see *United States* v. *Bass*, 327 F. Supp. 959, 960 (E.D. Wis. 1971) (acquittal on charge of *possession* of goods stolen from an interstate shipment bars subsequent

prosecution for *theft* of the same goods from the same shipment; motion to dismiss allowed.)

United States v. *Nash,* 447 F.2d 1382 (4th Cir. 1971). Here the defendant first was indicted for theft from the mails and found not guilty at a trial in which she testified in her own defense. She then was indicted for perjury in her testimony at the first trial, and convicted. On appeal her conviction was reversed and acquittal was directed.

> "Double jeopardy is a constitutional bar not only to retrial for the same offense, but also to relitigation of adjudicated issues whether they emerge in trials for the same or distinct offenses." 447 F.2d at 1382.

The Court ruled that the jury at the first trial must have believed the testimony of the defendant, 447 F.2d at 1385, and that for purposes of *res judicata* the determinative factor was "the presence or absence of a common 'core' in the two prosecutions." 447 F.2d at 1386.

See also, to the same effect, *Waller* v. *Florida,* 397 U.S. 387, 395 (1970) (conviction in municipal court for destruction of city property and disorderly conduct bars subsequent prosecution in state court for grand larceny, for the *same acts*); *United States* v. *Kramer,* 289 F.2d 909, 913 (2d Cir. 1961) (*res judicata* and collateral estoppel preclude conviction for conspiracy and receiving stolen goods after acquittal of offense of burglary of the same goods); *United States* v. *Sabella,* 272 F.2d 206, 212 (2d Cir. 1959) (defendant cannot be tried twice under different statutes for the same "fact situation"); *Cosgrove* v. *United States,* 224 F.2d 146, 158 (9th Cir. 1954) (acquittal on conspiracy counts bars retrial on substantive counts, on principles of *res judicata,* where "the basic facts in the two trials were identical.")

In substance it appears that the courts now are required

to apply in criminal cases the long-established rule in civil cases which precludes "splitting a cause of action." See, *e.g., Pan American Match, Inc.* v. *Sears, Roebuck & Co.,* 454 F.2d 871, 875 (1st Cir. 1972).

Application of the principles enunciated in the *Oppenheimer-Sealfon-Ashe* trilogy, and applied in other cases noted above, required the Court of Appeals to hold that as a matter of law the dismissal of the first indictment against the defendant O'Brien *on the basis of the grounds then stated by the United States Attorney* barred any further prosecution of O'Brien for the same acts or omissions upon which the first indictment was based.

Of course if a jury had been empanelled and trial had commenced, and *then* the United States Attorney had successfully moved to dismiss the indictment for lack of sufficient evidence to convict, any further prosecution for the same offense would be prohibited. *Downum* v. *United States,* 372 U.S. 734 (1963); *Cornero* v. *United States,* 48 F.2d 69, 71 (9th Cir. 1931) (cited and followed by the Supreme Court in *Downum*); *United States* v. *Armco Steel Corp.,* 252 F. Supp. 364, 377-378 (S.D. Calif. 1966) (dismissal of one count for lack of evidence bars further prosecution on second count severed for separate trial).

To permit a different result merely because the United States Attorney persuades the Court to approve dismissal of the indictment *before* trial commences, by representing to the Court *before* trial that the evidence is insufficient to warrant conviction and that further prosecution is not in the interests of justice, would be illogical, impracticable, and unfair to the defendant.

In this respect the decision of the Court of Appeals for the First Circuit in *United States* v. *Findley,* 439 F.2d 970 (1st Cir. 1971) is relevant. In *Findley* the defendant, indicted for refusal to report for induction into the armed services, had moved *before* trial to dismiss the indictment

on the grounds that the local board improperly had given no reason for its refusal to reopen his classification. The motion to dismiss was allowed and the government sought to appeal. The Court observed that:

> "... if a dismissal is a result of a showing of evidentiary facts dehors the indictment which, if established at a trial, would constitute a defense on the merits, the court's ruling, however described, ... is in effect an acquittal." 439 F.2d at 972.

The Court ruled that although the defendant had not been formally placed in jeopardy, he "should be treated as he would have been had he raised his defense only at trial." 439 F.2d at 973.

> "If an appeal will lie in the present case, while it cannot if the defendant waits and subjects himself to jeopardy, informed counsel believing they have a defense on the merits will henceforth protect their clients by avoiding an expediting procedure otherwise beneficial to all concerned, and only ignorant and ill-advised defendants will subject their defense on the merits to a government appeal. We will not adopt such a penalizing construction of the statute." 439 F.2d at 974.

In the present case the United States Attorney represented to the District Court that the evidence probably was insufficient to convict and moved for leave to dismiss the indictment. The present defendant, like Findley, should be treated no worse than he would have been if he had opposed the government's motion to dismiss, had persuaded the District Court to deny the motion, and had been tried and acquitted because of insufficiency of evi-

dence. The fact that the motion to dismiss the indictment was made by the United States Attorney in the present case, rather than by the defendant as in *Findley,* should be of no relevancy; in either case a decision by the District Court was required, and in this case, as in *Findley,* the dismissal was "a result of a showing of evidentiary facts dehors the indictment which, if established at a trial, would constitute a defense on the merits" and therefore equivalent to an acquittal. See 439 F.2d at 972.

See also, to the same effect as *Findley, United States* v. *Ponto,* 454 F.2d 657, 663-664 (7th Cir. 1971) (allowance of a motion to dismiss "not based on a defect in the wording of the indictment or in the institution of the proceeding" is an acquittal to which jeopardy attaches).

Prior to adoption of the present Federal Rules of Criminal Procedure, the prosecuting attorney had broad discretion to enter a *nolle prosequi* of an indictment and later seek a new indictment against the defendant for the same offense.

Rule 48(a) now provides that:

> "The Attorney General or the United States Attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant."

Thus the United States Attorney may dismiss an indictment prior to trial without the consent of the defendant, but only by leave of the Court.

The "by leave of court" provision is not devoid of significance. "The purpose of Rule 48(a) . . . is to protect a defendant from harassament by the government through charging, dismissing and then re-charging without placing

a defendant in jeopardy." *Woodring* v. *United States,* 311 F.2d 417, 424 (8th Cir. 1963).

When a proposed dismissal under Rule 48(a) is presented to the Court, the Court must "exercise a sound discretion in the premises", and except in unusual circumstances should permit dismissal only when "satisfied that the government lacks sufficient evidence to warrant a prosecution." *United States* v. *Doe,* 101 F.Supp. 609, 611 (D. Conn. 1951).

The Court ". . . should be satisfied that the reasons advanced for the proposed dismissal are substantial and the real reasons upon which the application is based." *United States* v. *Greater Blouse, Skirt & Neckwear Contractors Association,* 228 F.Supp. 483, 486 (S.D.N.Y. 1964).

With respect to the present case, the granting of leave to dismiss the first indictment was in effect the entry of final judgment in the first case. "A final judgment is the concluding judicial act or pronouncement of the court disposing of the matter before it." *In re Forstner Chain Corp.,* 177 F.2d 572, 576 (1st Cir. 1949).

The grounds stated by the United States Attorney for dismissal of the first indictment necessarily were the basis of *a decision made by the Court* to grant leave for dismissal, and of a final judgment in the case, and therefore became subject to the principles of *res judicata* and collateral estoppel with respect to any subsequent litigation between the United States and the defendant.

In the first case there was an adjudication by the District Court that leave should be given to dismiss the indictment because further prosecution would not be in the interests of justice; and that adjudication thereafter was binding upon the government for purposes of any further litigation between the government and the defendant, and was not subject to collateral attack by the gov-

ernment. *Lubben* v. *Selective Service System Local Board No. 27,* 453 F.2d 645, 649 (1st Cir. 1972).

The United States Attorney represented to the Court that the evidence available was insufficient to warrant proceeding with the case and that "further prosecution would not be in the interests of justice". The United States is bound by these representations, which were the basis of the Court's decision, by the most elementary theories of *res judicata* and collateral estoppel.

In effect, the United States Attorney proposed to remove the sword of Damocles from above the head of O'Brien and received permission of the Court to do so upon the basis of a solemn promise to the Court and O'Brien that the sword would not be raised again.

To require the United States Attorney — or, in this case, his successor — to keep that promise in the present case does not mean that every dismissal under Rule 48(a) will preclude further prosecution of a defendant.

We suggest only that where leave to dismiss an indictment is obtained from the Court upon the basis of representations that the evidence is insufficient for conviction and that further prosecution is not in the interests of justice, then further prosecution should *not* be permitted.

A United States Attorney still should be free to dismiss one of two pending indictments and to proceed on the other, as in *United States* v. *Daley,* 454 F.2d 505, 508 (1st Cir. 1972), *United States* v. *Manetti,* 323 F.Supp. 683 (D.Del. 1971), or *United States* v. *Bowles,* 183 F.Supp. 237 (D.Me. 1958); or to dismiss one count of a multi-count indictment, as in *Woodring* v. *United States,* 311 F.2d 417, 424 (8th Cir. 1963).

Perhaps there is no fundamental unfairness in permitting dismissal of an indictment where the defendant clearly is made aware that a second indictment is contemplated and the dismissal expressly is designated as being "with-

out prejudice". See *Mann* v. *United States*, 304 F.2d 394, 398 (D.C.Cir. 1962), *cert. denied* 371 U.S. 896 ("At most, he is entitled to know whether the sword of Damocles still hangs over him. . . .Here the required warning was given. . . .") *Cf. White* v. *United States*, 377 F.2d 948 (D.C. Cir. 1967) (dismissal of indictment "with prejudice" constitutes a bar to another prosecution for the same offense).

And of course it always has been recognized that dismissal of an indictment by reason of some defect in its form does not bar reindictment in a proper manner. *Oppenheimer* v. *United States*, 242 U.S. 85, 87 (1916).

Suffice it to say that the present case falls into none of these categories. Here the indictment was dismissed because further prosecution would not be in the interests of justice.

Any possible contention by the government that the second indictment of the defendant was other than a further prosecution for the same transactions on which the first indictment was based is untenable.

The first indictment charged the defendant with attempting to evade income taxes for four calendar years by filing false tax returns which understated his taxable income. The second indictment charged him with filing false tax returns which understated his gross income from his business or profession for the same years. The tax returns described in the two indictments necessarily are the same returns, and the alleged understatements of gross income necessarily led to the alleged understatements of taxable income.

If a taxpayer attempts to evade the payment of taxes by filing a false tax return which understates his income, he violates the provisions of both 26 U.S.C. 7201 (tax evasion) and 26 U.S.C. 7206(1) (false statements); but the violation of 7206(1) is merely one aspect of the broader vio-

lation of 7201, and the taxpayer cannot be subjected to cumulative penalties for violation of both sections. *United States* v. *White*, 417 F.2d 89, 94 (2d Cir. 1969) (same two sections); *United States* v. *Lodwick*, 410 F.2d 1202, 1206 (8th Cir. 1969), *cert. denied* 396 U.S. 841 (same two sections); *Gaunt* v. *United States*, 184 F.2d 284, 290 (1st Cir. 1950), *cert. denied* 340 U.S. 917 (analogous sections of prior law).

Thus in the present case the second indictment was a further prosecution for part of the same acts charged in the first indictment, although based upon a different statutory provision.

(It is possible, of course, to conceive of hypothetical cases in which a taxpayer could be guilty of a violation of 7206(1) without having an intent to evade taxes in violation of 7201; but such cases would be highly unusual and quite irrelevant to the present situation in which the defendant was subjected to successive prosecutions for what are obviously the same transactions.)

The decisions of the Supreme Court in the *Ashe* and *Waller* cases noted above establish beyond doubt that the two indictments involved in the present matter were for the "same offense", within the meaning of that phrase as found in the Fifth Amendment. The District Court therefore erred in denying the defendant's motion to dismiss and in entering judgment of conviction in the present case. The Court of Appeals erred in affirming the judgment of the District Court.

II. The Decision Below Conflicts With The Decisions Of This Court And With The Decisions Of Other Courts Of Appeals As To The Proper Interpretation Of Judicial Estoppel.

The decision of the Court of Appeals conflicts with the decisions of this Court and with the decisions of other

courts of appeals as to the proper interpretation of judicial estoppel.

The second prosecution of the defendant was barred by reason of judicial estoppel.

Apart from any effect of application of the principles of double jeopardy, collateral estoppel, or *res judicata*, in the second case the government should be held estopped to further prosecute the defendant after obtaining leave of court to dismiss the first indictment upon a representation that the evidence was insufficient to convict and that further prosecution would not be in the interests of justice.

As noted above, the second prosecution was for essentially the same offenses as those alleged in the earlier indictment.

The rule is well established in our jurisprudence that where a party obtains some desired result on the basis of representations made by him in the course of judicial proceedings, he will not be permitted to assume a contrary or inconsistent position in subsequent litigation with the same opposing party.

See, *e.g.*, *Davis* v. *Wakelee*, 156 U.S. 680, 689 (1895). Davis made a series of notes which were assigned to Wakelee. Davis went into bankruptcy and while it was pending, Wakelee obtained a judgment against Davis on the notes. When Wakelee opposed Davis's discharge in bankruptcy, Davis obtained a discharge on the basis of that judgment. Thereafter Wakelee sued on the judgment and Davis asserted that it was void for lack of jurisdiction; this Court held that Davis was estopped to make such an assertion:

> "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his

interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." 156 U.S. at 689.

To the same general effect, see, *e.g.*, *Hurd* v. *Dimento & Sullivan*, 440 F.2d 1322 (1st Cir. 1971) (plaintiff estopped by her own pleadings); *United States* v. *266.25 Acres of Land*, 43 F.Supp. 633, 635 (E.D.S.C. 1942) (government estopped to contend that value of land was less than it had represented in declaration of taking and had paid into court).

In the present case, the United States Attorney obtained leave of court to dismiss the first indictment by representing that further prosecution would not be in the interests of justice. To permit him to assume a contrary position in the present case plainly would be to the prejudice of the defendant (who could have attempted to persuade Judge Wyzanski to *deny* leave to dismiss and to permit the first case to proceed to a trial in which the evidence would not be likely to result in conviction, as the government conceded).

Although the doctrine of estoppel (other than collateral estoppel or *res judicata*) sometimes is held inapplicable to the government, it will be applied where necessary to prevent injustice. See *e.g.*, *United States* v. *Mailet*, 294 F.Supp. 761, 768 (D.Mass. 1968) (bona fide purchaser of property relied on documents fraudulently prepared by government employee); *Walsonavich* v. *United States*, 355 F.2d 96, 101 (3d Cir. 1964) (tax refund case; ". . . there are circumstances where the Government should be required by our law to stand behind the written agreement of a high public official in order to prevent manifest injustice.")

It would be most unfair to permit the government to obtain leave to dismiss an indictment by representing that

further prosecution is *not* in the interests of justice and thereafter to take a contrary position and embark upon further prosecution for essentially the same offense. The doctrine of judicial estoppel should be applied to this situation, and this Court should hold that in the circumstances of this case the United States Attorney was estopped by his prior contentions to prosecute the defendant upon the second indictment.

The Court of Appeals was in error when it concluded in its opinion that ". . . a change in circumstances or available evidence made a prosecution for violation of the internal revenue laws, once thought futile for lack of evidence and therefore not in the interests of justice, suddenly feasible and therefore proper." There was no change in circumstances or available evidence. The same circumstances and the same evidence was involved. *In fact,* the only difference was that the government decided that no evidence secured by the Special Agent would be used in the second trial; that the Special Agent would not testify; and that the Revenue Agent would be the government's principal witness.

Thus, it is difficult to understand how the Court of Appeals could have concluded that with less evidence available that a case was suddenly "feasible and therefore proper."

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

JOHN M. DOUKAS
Of Counsel
August 14, 1972

BLAIR L. PERRY
28 State Street
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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 72-1083.

UNITED STATES OF AMERICA,
APPELLEE,
v.
THOMAS J. O'BRIEN,
DEFENDANT, APPELLANT.

JUDGMENT

Entered: July 18, 1972

This cause was submitted upon briefs on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
Dana H. Gallup, *Clerk.*
By: (s) Francis P. Scigliano
Chief Deputy Clerk

[cc: Messrs. Doukas and Hollingsworth.]

United States Court of Appeals
For the First Circuit

No. 72-1083.

UNITED STATES OF AMERICA,

APPELLEE,

v.

THOMAS J. O'BRIEN,

DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

John M. Doukas and *Blair L. Perry* on brief for appellant.
Joseph L. Tauro, United States Attorney, *Wayne B. Hollingsworth*, Assistant United States Attorney, and *Bruce J. Rakay* on brief for appellee.

July 18, 1972.

PER CURIAM. On June 10, 1970, appellant was indicted by a grand jury and was charged with having attempted to evade payment of taxes for calendar years 1964 through 1967 by filing fraudulent returns in violation of 26 U.S.C. § 7201. After pleading not guilty to this indictment, appellant filed a motion seeking to suppress certain of his tax records in the government's possession. The district court granted the motion to suppress, citing our opinion in *United States* v. *Leahey*, 434 F.2d 7 (1970). The government then moved under Rule 48(a), F.R.Crim.P., for leave to dismiss the indictment, stating that since the bulk of its evidence had been suppressed it saw no reasonable

likelihood that the case could be brought to conviction and that further prosecution would not be in the interests of justice. Leave to dismiss the indictment was granted by the court.

Three months after the first indictment was dismissed, appellant was again indicted. The second indictment charged him with having made false statements under oath in estimating his gross business income for calendar years 1964 through 1967 in violation of 26 U.S.C. § 7206(1). Appellant waived a jury trial on the second indictment and "assented" to a finding of guilty on all counts, reserving his right to appeal to this court on the issue of whether dismissal of the first indictment barred prosecution on the second on grounds of due process, estoppel or double jeopardy. *See Haynes* v. *United States,* 390 U.S. 85, 87 n. 2 (1968).

Even assuming that the second indictment involved acts substantially similar to those charged in the first, appellant has failed to convince us that we should abandon the usual rule that dismissal of an indictment under Rule 48(a) is without prejudice unless the court explicitly indicates otherwise or unless jeopardy has attached. *See, e.g., White* v. *United States,* 377 F.2d 948 (D. C. Cir. 1967) ("dismissal with prejudice constituted an adjudication which barred another prosecution for the same offense"); *Downum* v. *United States,* 372 U.S. 734 (1963) (jeopardy attaches when the jury is impaneled). Here, the absence of a statement by the court that its dismissal was to be with prejudice and the fact that the order dismissing the cause was entered prior to impaneling of a jury make this case one within the general rule allowing reindictment.

Nor is this a case in which the appellant's ability to defend himself has been prejudiced by the delay in prosecution or in which the government's power to dismiss a pending indictment under Rule 48(a) without prejudice

to a later decision to reindict has been misused so as to call for judicial sanction. *See, e.g., Barker* v. *Wingo,* 40 U.S.L.W. 4080 (U.S. June 22, 1972) (length of delay in bringing defendant to trial, reason for delay and prejudice to the defendant are factors relevant to determination of whether defendant has been denied the right to a speedy trial); *Klopfer* v. *North Carolina,* 386 U.S. 213 (1967) (prosecutor abused his nolle prosequi power to harass a defendant). For all that appears or is alleged here, the district court was justified in believing that a change in circumstances or available evidence made a prosecution for violation of the internal revenue laws, once thought futile for lack of evidence and therefore not in the interests of justice, suddenly feasible and therefore proper.

Affirmed.